

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAH M. DALTON,

Plaintiff,

vs.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,
Defendant.

Case No. 14-0047-CV-W-ODS

**ORDER AND OPINION DENYING DEFENDANT'S
MOTION TO DISMISS**

Pending is Defendant's Motion to Dismiss, which contends Plaintiff's appeal of the final decision denying her application for benefits was untimely. The motion (Doc. # 4) is denied.

An appeal must be filed within sixty days after the Appeals Council's decision is mailed "or within such further time as the Commissioner of Social Security may allow." 42 U.S.C. § 405(g). By regulation, the Commissioner has decreed that a suit must be filed within sixty days of receipt of the Appeals Council's decision, and receipt is presumed to have occurred five days after mailing. 20 C.F.R. § 422.210(c).

The Appeals Council's decision is dated November 7, 2013. Defendant's time calculations and arguments are based on this date. However, Plaintiff has presented evidence – which was not rebutted or addressed because Defendant elected not to file Reply Suggestions – indicating the Appeals Council's decision was postmarked on November 11, 2013. This date was a federal holiday (which raises a question as to how it was postmarked on that date), and the Court takes judicial notice of the fact that mail does not move on federal holidays. Thus, the Appeals Council's decision was effectively mailed on November 12, and Plaintiff is presumed to have received it on November 18 (because November 17 was a Sunday and mail is not delivered on

Sunday). Plaintiff thus had to file this action by January 17, 2014. The case was filed on January 16, so it was timely.¹

The Commissioner shall have until and including July 8, 2014, to file an Answer in this case.

IT IS SO ORDERED.

DATE: June 4, 2014

/s/ Ortrie D. Smith
ORTRIE D. SMITH, SENIOR JUDGE
UNITED STATES DISTRICT COURT

¹The suit was timely even if the presumptive date of receipt was Sunday, November 17.